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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 306

ARROW LINES, INC.

PETITIONER,

vs.

BARBARA BRAMMER and
DAVID BRAMMER

RESPONDENTS

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONER,

VS:

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RESPONDENTS

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Aroow Lines, Inc., a corporation, Petitioner herein, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case as set out below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, infra.) is not yet officially reported.

## JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit was entered on March 5, 1970. A timely Petition for rehearing, including a suggestion for rehearing *en banc*, was filed by Petitioner; this was denied by Order entered on March 23, 1970, (App. B, infra.). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

## QUESTIONS PRESENTED

1. Was the plaintiff Barbara Brammer guilty of contributory negligence which as a matter of law precluded recovery by her and by David Brammer, her husband?

2. Was Arrow Lines, Inc., responsible in damages to plaintiffs as a result of the actions of Dallas Whitaker, driver of a truck involved in the accident material herein, where Arrow Lines, Inc., a carrier of exempt (agricultural) commodities has an express agreement with the truck owner as independent contractor?

3. Did the court below err in holding that 49 U.S.C.A. § 304(7)(c) relating to leases by authorized motor carriers also applies to carriers of exempt commodities as set forth in the Memorandum Order of the trial court?

4. Did the court below err in holding that Arrow Lines, Inc. is not entitled to indemnification from the truck's owner despite an agreement in writing to the contrary?

5. Was proper objection made to the refusal of the trial court to give Defendant Arrow Lines Request for Charge No. 1?

## STATUTES INVOLVED

The pertinent statutes involved are:

49 U.S.C.A. § 303 (b)(6):

> (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: . . .

49 U.S.C.A. § 304(e) and (f):

> (e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a

copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a) (17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title or perishable products manufactured from perishable property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor

carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b) (6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

## STATEMENT OF THE CASE

This case involves a collision between an automobile being driven by Barbara Brammer and a truck being driven by one Dallas Whitaker on November 22, 1964, at an intersection in Huntington, Wayne County, West Virginia. Barbara Brammer claimed injury as a result of the action, and brought suit in which she was joined by her husband; David Brammer. David Brammer was not present at the time of the collision; his action was for expenses and loss of consortium.

Action was originally brought against several defendants, including the driver, Dallas Whitaker, but not including the present appellant, Arrow Lines, Inc. An Amended Complaint was filed to include Arrow Lines as a defendant. For a variety of reasons not here pertinent, some defendants were dismissed. The driver, Dallas Whitaker, had died in the interim and counsel for plaintiffs elected not to proceed against his estate, leaving the present parties.

The vehicle being driven by Whitaker was owned by Bazile, and was a tractor-trailer rig being used to haul agricultural commodities under an agreement in writing with Arrow Lines. The status of Whitaker as agent and employee at the time of the accident is in dispute.

The action was tried to a jury following interim motions and resulted in verdicts for the plaintiffs in the amount of $38,000.00 for Barbara Brammer and $5,000.00 for David Brammer.

Arrow Lines made various motions during and following the trial, resulting in the Memorandum Opinions (Appendices D and E) and judgments of the trial court from which appeal was made to the Fourth Circuit.

The material facts are basically not in dispute, and will be summarized here only briefly.

The facts concerning the accident as such are that Barbara Brammer and a companion were in the Brammer auto, on an errand late at night. Barbara Brammer stopped for a stoplight on a through highway, and saw the truck being driven by Whitaker approaching while she was stopped. The light in her direction turned green, and Mrs. Brammer pulled into the intersection. The truck did not stop or slow, and the collision occurred. The truck was lighted, and there were no obstructions to Mrs. Brammer's visibility.

The facts relating to the status of the truck driver, Dallas Whitaker, are also not in basic dispute. Whitaker was a driver for Bazile, and picked up a

load of frozen turkeys from Arrow Lines for a return haul, after completion of a delivery not here pertinent. He signed an agreement in writing relating to the trip, for Bazile, which is later set out herein. This was also signed by an agent for Arrow Lines. The agreement basically provided for the payment to Bazile for truck and driver at a percentage of the charges paid to Arrow Lines by the shipper. The agreed payment was made and accepted following the accident.

By agreement, determination of the status of Whitaker and the Cross-Claim of Arrow Lines against Bazile was deferred.

The Trial Court issued separate Memorandum Opinions and entered judgments thereon; the first of these denied the post-trial motions of the defendants, and the second found Arrow Lines responsible for the action of Whitaker and thus liable to plaintiffs.

## ARGUMENT OF REASONS FOR GRANTING WRIT

*The Negligence of Barbara Brammer.* At the close of evidence, as well as before, appellant moved that a verdict for this defendant be directed on the ground that plaintiff Barbara Brammer was guilty of negligence as a matter of law. This defendant again submits that the evidence as to this issue was not in conflict, and that Barbara Brammer was guilty of negligence as a matter of law, precluding recovery by plaintiffs.

The testimony of Barbara Brammer varies only in the number of times she saw the truck being driven by Dallas Whitaker prior to the collision. It is not contradicted that the truck was open, obvious and visible to her while it was a considerable distance away and continued to be visible until the collision, without slowing, as borne out by her discovery deposition and her trial testimony. On trial, her testimony was that the distance at which she first saw the truck was 750 feet, she then looked again and saw it at 400 feet, and did not look again until just prior to the collision.

*At all times, the truck was visible to her and was an open and obvious danger.* Her statement, in fact, was that the truck was "Just the biggest truck I've ever seen".

It is clear that under controlling substantive law, Mrs. Brammer was guilty of contributory negligence as a matter of law. There was no conflict in fact as to this point. In the recent decision *Harner v. John McShain, Inc., of Maryland*, 4th Cir., 1968, 394 F.2d 480, 481, the court says, after stating that the trial court had properly applied West Virginia substantive law:

> . . . whether the danger was open and obvious or whether plaintiff in the exercise of due care should have seen it, is a question upon which reasonable minds may differ.

That case, however, presented a factual issue in that there was testimony from the plaintiff which indicated the danger - lack of wiring on mesh - was not visible without close inspection.

In the instant case, the evidence is that the danger was open and obvious; that being so, there was no factual issue for submission to the jury.

See *Moore v. Skyline Cab Co.*, 134 W. Va. 121, 59 S.E. 2d 437, 443. The Virginia case *Sayre v. Shields*, ..... Va. ....., 164 S.E. 2d 665 (1968), summarily upheld the trial court's action in setting aside a plaintiff's verdict where plaintiff's testimony was that she did not see the defendant's vehicle. The Court said, 169 S.E. 2d at p. 667:

> . . . Reasonable men should not disagree that the plaintiff was negligent in failing to see defendant's cab, which was in plain view, and that her negligence efficiently contributed to the accident. She is thus barred from recovery, since it is apparent that the contributory negligence of the plaintiff and the primary negligence of the defendant concurred to cause the accident.

The factual situation as to Mrs. Brammer is even more aggravated than that in the above Virginia case, of course, since Mrs. Brammer's failure was to look concerning a danger of which she had prior *actual* knowledge.

*The employee status of Dallas Whitaker.* The deposition of Myron J. Bazile, owner of the truck involved, and his testimony under the Court's questioning, clearly show that Dallas Whitaker, driver of the truck involved in the collision with which this action is concerned, was the employee of Myron Bazile and not of Arrow Lines, Inc. Mr. Bazile testified that Whitaker was working for him on

November 22, 1964. Whitaker was paid by the mile by Bazile for driving. A lease of equipment agreement, designated Arrow Lines Exhibit "A" was attached to the deposition and Bazile received payment for Arrow Lines in accordance with that agreement. Bazile further testified that Whitaker signed that instrument for him, and that Whitaker's act in so doing was ratified by Bazile. Whitaker was under the employment, control and supervision of Bazile at the time the agreement was entered into.

In addition, Mr. Bazile's testimony was that he had accepted the payment for the carriage. He is, thus, precluded from denying Whitaker's authority for entering into the specific agreement in question.

An affidavit of David Brammer was submitted by counsel for plaintiffs, which if taken at its face would indicate Arrow Lines' employee, William Ferguson, had accepted responsibility for Whitaker's actions.

This is, of course, countered by Mr. Ferguson's affidavit, but there is one additional factor which should be determinative of this alleged acceptance; this is the fact that the Complaint originally filed did not even include Arrow Lines as a defendant, although several others were named.

Since Mr. Whitaker was at all times the employee of Myron Bazile and not of Arrow Lines. Inc., the finding of liability of Arrow Lines under the doctrine *respondeat superior* is not supported.

The Trial Court, in its Memorandum Opinion of April 1, 1969, cites 49 U.S.C.A. § 304(e), as authority for holding Arrow Lines liable.

However, 49 U.S.C.A. § 303(b) (6) excludes carriers of exempt commodities from all provisions except those relating to qualifications and maximum hours of service of employees and safety of operation or standards of equipment. It was stipulated that the carriage herein was of exempt commodities.

*American Trucking Association, Inc. v. U. S.*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed 359 (1952) contains the following pertinent language, at 344 U.S. 317, 97 L. Ed 359; as to applicability of the cited statute:

> As indicated above, the Act also exempts from Commission jurisdiction "motor vehicles used in carrying property consisting of" (agricultural & similar products); § 203(b)(6) . . . *All admit, of course, that the rules do not directly apply to agricultural equipment; it is merely required that authorized carriers using such trucks comply with certain provisions.* (Emphasis added).

An authorized carrier is stated therein to be a common carrier rather than a carrier of exempt commodities. Therefore, the statute cited supports the position of Arrow Lines - not that of plaintiffs.

*Failure to give Arrow Lines Request for Charge No. 1.* Upon the denial of Arrow Lines Request for Charge No. 1, the Court indicated that the matters set forth could be argued by counsel for Arrow Lines. This argument as to law is not persuasive to a jury - and may not, in fact, even be cognizable - in view of the Court's instructions as to law. Arrow Lines submits that the request for charge is one which should properly have been given, and that there was no necessity for exception to its not being given.

## CONCLUSION

For the reasons stated above, it is respectfully requested that this Court issue its Writ of Certiorari to review the decision below.

Respectfully submitted,
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*Of Counsel*

## APPENDIX A

### UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13,706

Barbara Brammer and David Brammer,
Plaintiffs-Appellees,

versus

Arrow Lines, Inc., a corporation,
Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Sidney L. Christie, District Judge.

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(Argued March 2, 1970 Decided March 5, 1970)

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Before WINTER, CRAVEN and BUTZNER,
Circuit Judges.

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C. Robert Schaub (Jenkins, Schaub & Fenstermaker on brief) for Appellants, and Norman E. Rood (Robert O. Ellis on brief) for Appellees.

PER CURIAM:

In this diversity action, arising from a motor vehicle collision, we think that the issue of plaintiff's contributory negligence was under applicable law a question solely for the jury. The jury exonerated

plaintiff. The district judge's determination that the deceased truck driver was the agent or servant of the corporate defendant was neither factually erroneous nor legally incorrect. Plaintiff's recovery was not excessive. The charge to the jury was not excepted to in the regard complained of now, and contained no manifest error.

*AFFIRMED.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,706

Barbara Brammer and David Brammer,

Plaintiffs-Appellees,

versus

Arrow Lines, Inc., a corporation,

Defendant-Appellant.

---

— ORDER —

The petition for rehearing, including a suggestion for rehearing on banc, having been considered by the original panel, no member of the Court having requested a poll on the suggestion for rehearing on banc, and the original panel unanimously being of the view that it should be denied, it is

*ORDERED,* that the petition for rehearing be, and it is hereby, denied.

For the Court:

*s/ Harrison L. Winter*
United States Circuit Judge

Filed March 23, 1970
Samuel W. Phillips, Clerk

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

AT HUNTINGTON

BARBARA BRAMMER and
DAVID BRAMMER,
Plaintiffs,

Vs. CIVIL ACTION NO. 2188

MYRON J. BAZILE and
ARROW LINES, INC.,
a corporation,
Defendants.

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### MEMORANDUM ORDER

This matter is presently before the Court upon the joint motion of defendants Myron J. Bazile and Arrow Lines, Inc. (1) that the judgment entered for the plaintiffs on the 26th day of July, 1968, upon the verdict of the jury, be set aside and that judgment be entered for the defendants as set forth in the motions for directed verdict made at the trial, or, in the alternative, (2) that the verdict and judgment be set aside and a new trial awarded the defendants on the grounds that (a) the verdict is so excessive as to each plaintiff as to show bias and prejudice on the part of the jurors, and (b) the verdict is contrary to the law and the evidence.

The case grew out of an intersectional collision between plaintiffs' automobile and defendants' truck and the issues of primary and contributory negligence of the drivers of the respective vehicles as well as the issue of the quantum of damages of each party plaintiff were tried to the Court and a jury and resulted in a verdict for the plaintiffs. The damages awarded were in the sums of $38,000 to Mrs. Brammer and $5,000 to Mr. Brammer.

A review of the trial record as to these issues and a study of the briefs of respective counsel with reference thereto convinces the Court that the evidence was sufficient to require submission of both the truck driver's primary negligence and the car driver's contributory negligence to the jury, and the Court is now precluded from disturbing the jury's verdict. See *Harner* v. *John McShain, Inc.*, 394 F.2d 480 (4th Cir. 1968). Likewise, the Court finds that, under the evidence, the awards of damages were not so grossly excessive as to require a remittitur nor the errors assigned sufficient to justify the granting of a new trial. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968). It is therefore

ORDERED that said motion, in both aspects, be, and the same is, hereby overruled.

The disposition thus made of the defendants' said post-trial motion on the issues of primary and contributory negligence and damages requires that the Court now take up and decide the secondary issue, provided for in the pre-trial order, involving a question of law, or a mixed question of law and fact, and which was to be submitted to the Court for resolution

in the event a verdict was rendered against either or both defendants. The pertinent part of the pre-trial order in this regard reads,

> "The parties further recognizing that whether either or both defendants are liable for the acts and conduct of Whitaker is essentially a question of law, or a mixed question of law and fact, by and through their respective counsel, have stipulated and agreed, and do hereby stipulate and agree, that in the event the jury resolves the negligence issue against Whitaker and returns a verdict against either or both defendants, then, and in that event, all issues of law and fact pertinent to the joint or separate liability of either or both defendants for payment of any such verdict, or pertinent to the cross-claim of Arrow Lines, Inc., against Bazile, shall be submitted to the Court for decision upon the record as it shall exist when such verdict is returned and upon such other evidence, documents and exhibits as any party in interest may thereafter submit, the same being pertinent. It being understood and agreed by all parties as well as by the Court that the procedure herein adopted of deferring the resolution of the issue of liability of either or both defendants for the negligence, if any, of Whitaker shall in nowise operate to prejudice any party, plaintiffs or defendants, in the question of whether either or both defendants are answerable in law for Whitaker's negligence."

By stipulation and agreement of counsel for the respective parties, in the consideration and disposition of this secondary issue, the Court is required to look to (1) the record of the negligence trial, (2) the ICC regulations, (3) Arrow's West Virginia PSC affidavit, (4) the written lease agreement be-

tween Bazile and Arrow, (5) Bazile's discovery deposition, (6) Joe Mudd's discovery deposition, (7) Edward Smith's discovery deposition, (8) Arrow's admission to plaintiffs' interrogatories, (9) Bazile's answers to plaintiffs' interrogatories, (10) the St. Louis Insurance check to A. W. & Linda Johnston for $1,608.00, (11) letter of T. R. Bolen, St. Louis' Claims Supervisor, dated November 12, 1968, (12) affidavit of David Brammer, dated July 23, 1968, and (13) William L. Ferguson's affidavit, dated February 1, 1969.

Reviewing the record as thus constituted, the salient facts and circumstances, as they relate to the secondary issue now before the Court, would appear to be:

Arrow Lines, Inc., was at and before the time of the accident a franchised carrier, engaged in interstate commerce, and had, on November 19, 1964, leased from Myron J. Bazile for the term of one year, unless sooner terminated, a tractor-trailer truck which later became involved in a collision with plaintiffs' automobile on November 22, 1964, at an intersection of U.S. Route 60 (Waverly Road) and Wayne Street, in the city of Huntington, West Virginia. The truck was driven at the time by one Dallas R. Whitaker, and was en route from Monett, Missouri, to Charleston, West Virginia, with a cargo of 840 boxes of frozen turkeys, an exempt commodity under 49 U.S.C.A., 303(b)(6). Arrow had previously filed with the Public Service Commission of West Virginia an affidavit that this type of cargo was exempt under federal regulations. The exempt status of the cargo is conceded by all parties.

Under the terms of the lease agreement, Bazile was to furnish the equipment and driver as an independent contractor, and was not to hold himself out as Arrow's agent or otherwise transact any business for Arrow without Arrow's written consent. Bazile was to bear all the operating expense of the truck and equipment and select (with Arrow's approval) the driver and pay his wages. Bazile therein also agreed to report accidents, first to Arrow's insurance carrier and then to Arrow itself, and to indemnify Arrow for his or his driver's torts. Arrow was to carry property damage, public liability and cargo insurance, but Bazile was to be liable for loss or damage to cargo not covered by insurance. Bazile, if he so desired, could carry collision insurance. Bazile was to pay all taxes on truck and equipment, but Arrow could pay such taxes and deduct the amount from the lease rental. As rental for the vehicle and equipment, Arrow agreed to pay Bazile 85% of revenue on all loads.

In answer to plaintiffs' requests for admission, Arrow stated that it accepted Whitaker as the driver of the truck leased; that it instructed him to follow all applicable laws, statutes and regulations; that it gave Whitaker a copy of the lease agreement, which was entered into in its general business as a carrier of exempt commodities; that it paid Bazile the revenue to which he was entitled for the cargo transported; that it was required by law to, and did, carry public liability insurance covering the Bazile truck, and that its insurance carrier paid the claim of a passenger in plaintiffs' car (Linda Johnston) who was injured in the accident, and that William L.

Ferguson was authorized to, and did, execute the lease agreement on its behalf,

In an affidavit, William L. Ferguson stated that he was Arrow's Branch Manager at the time the lease was entered into; that Whitaker signed the lease as Bazile's agent; that the lease was executed at Springdale, Arkansas; that it was a trip lease and that he, at the time, considered Whitaker to be the employee of Bazile rather than Arrow.

Dallas R. Whitaker died following the accident from causes not associated with it. Before his death, he had prepared a statement concerning the accident. This statement, with the part thereof detailing the manner in which the accident occurred deleted, was admitted into the record. In it, Whitaker points out that he was employed by Bazile as a driver, was paid by the mile, the "rig" was leased by Bazile to "Associated Dispatch, University Ave., St. Paul, Minnesota, and (he) was also leased to Arrow Lines, Inc;" that all hauling permits came from Arrow; that Arrow gave him the "stickers" to put on the trailer, and that the gross weight of the rig at the time was abou sixty-two or sixty-three thousand pounds.

Myron J. Bazile, in answer to interrogatories, stated that he was in the trucking business at Appleton, Wisconsin; that he leased the truck in question to Associated Dispatch of St. Paul, Minnesota, with Dallas Whitaker as driver, and that either Whitaker or Associated Dispatch later leased it to Arrow Lines, Inc. In a deposition later given, Bazile stated that he was paid by Arrow; that Associated Dispatch received a percentage of the revenue; that Whitaker

was hired by him as a driver and was paid on a mileage basis, part of which was paid Whitaker as an "advance" by Arrow; that Whitaker was authorized to sign lease agreements on his behalf and had frequently done so over the year or more of his employment with him, and that, although he did not specifically authorize Whitaker to sign the particular agreement here involved and was unaware that Whitaker had leased the truck to Arrow, nevertheless, he would have authorized it had he been asked and, further, that it was a customary and normal transaction in the trade. He also stated in his deposition that he had not been in communication with Whitaker for a week or more prior to the time of the accident and did not know where he or the truck was during this period of time. He further deposed that he possessed no authority from the ICC to operate as a common carrier in interstate commerce nor any authority from any state to operate intrastate, and that he had never applied to or received any authority or permit from the Public Service Commission of West Virginia to transport exempt commodities in that state. He agreed with Ferguson, Arrow's Branch Manager, that the undertaking in question was a trip-lease arrangement. In answer to an interrogatory, Bazile stated that Whitaker was employed by Arrow Lines, but in his deposition and in his testimony at trial he asserted that Whitaker was *his* employee. However, in each instance he was consistent in his position and statements that, normally, when a truck is leased the driver and the truck are under the control of the lessee (Arrow in this instance) until the lead is delivered, and that such is the custom of the trade. This was first brought out by Bazile on March 21, 1967, in answer to an interrogatory. He

later testified to the same effect when his deposition was taken on February 10, 1968, and again at trial on July 26, 1968. Ferguson and Arrow had ample opportunity to refute this testimony, since Ferguson's affidavit was not given until February 1, 1969, yet we can find no contradiction of it therein or at any other place in the record.

While it is quite true that, taken literally, the terminology of the lease agreement describes Bazile as an independent contractor and for whose conduct Arrow was not to be responsible. However, it is axiomatic that the consequences of the transaction are to be governed by substance, not form. More persuasive are the circumstances of the transaction, not the least of which are (a) the fact that the Bazile truck could not have undertaken the trip of all except by and with the authority possessed by Arrow and with its stickers or decals identifying the truck as an interstate common carrier in its service; (b) the fact that Arrow carried public liability and property damage insurance on the truck to protect others; (c) the fact that accidents were first to be reported to Arrow's insurance carrier and then to Arrow, and (d) the fact that Arrow's insurance carrier did in fact pay the Johnston claim arising out of the same occurrence for which it now (through Arrow) denies liability to the plaintiffs in this action. Under these and other facts and circumstances, hereinbefore detailed, Arrow cannot be allowed to escape liability for the loss sustained by the plaintiffs by reliance upon the bare terms of a prearranged contract, limiting its responsibility for the operation of the truck, concerning which plaintiffs had no notice or knowledge.

We find, moreover, that for the purpose of the trip, Dallas R. Whitaker was merely a nominal employee of Bazile and that, insofar as the performance of the particular service was concerned, he was under the control and subject to the direction of Arrow. The cargo of frozen turkeys was Arrow's — not Bazile's — to transport from Missouri to West Virginia. It was Arrow — not Bazile — who set up the trip and selected Whitaker as the driver. Bazile had no personal knowledge of the arrangement or the mission. He is involved only because he was Whitaker's employer initially and seemingly had clothed him with authority to make such a transaction in his behalf. Thus, in view of these circumstances, the nature of the undertaking and Bazile's and Arrow's common interest to be served thereby and the benefits to be derived by each therefrom, it is concluded that Whitaker was partially the agent and servant of Bazile and partially the agent and servant of Arrow, and that both are jointly answerable in law for his acts or omissions, as will be hereinafter shown. This view is in accord with Section 227 of the Restatement of the Law of Agency (Second):

> "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the service. He may become the other's servant as to some acts and not as to others."

Under the Motor Carrier Act, now known as Pt. II of the Interstate Commerce Act, 49 U.S.C.A. 304(7)(c), the Interstate Commerce Commission is authorized to prescribe regulations with respect to the use by motor carriers of motor vehicles not owned by them, such as vehicles under lease, contract or other arrangement, in the transportation of property, in-

cluding such regulations as may be reasonably necessary in order to "assure that while motor vehicles are being so used the motor carrier will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . . ." This delegation of power and authority by Congress to the ICC was upheld by the Supreme Court in *American Trucking Assns.* v. *United States,* 344 U.S. 298 (1953). The ICC has promulgated a set of rules and regulations pursuant to the Act, 49 C.F.R. 165, et seq. We are primarily concerned with Rule 207.4, providing, among other things, that any arrangement by authorized carriers for the use of equipment which they do not own shall be in writing . . . "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the authorized carrier . . . ." Obviously, the lease agreement between Bazile and Arrow is not in compliance with this regulation, since it attempts to relieve Arrow of the responsibility thereby imposed upon it as lessee of the truck. Arrow would escape the force of the regulation, however, by reliance upon Section 303(b)(6), which grants exemption to motor vehicles hauling agriculture and related products. Such reliance is ill-founded. It is our view that this section does not in any way proscribe or render inapplicable the safety elements of Section 304(7)(e) which have for their primary purpose the protection of the traveling public upon the highways.

As we have pointed out, it is established without dispute that Bazile had no certificate from any pub-

lic authority to transport property for hire in either intrastate or interstate commerce, and that he shipment with which we are here concerned could only be transported under a franchise granted by public authority. Arrow had such authority; Bazile did not. This Court will take judicial notice of the fact, as others have done, that the size of the vehicle and weight here involved posed an unreasonable risk of harm to other users of the highways. Thus, Section 428 of the Restatement of the Law of Torts (Second) is applicable:

> "An individual of a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

We, therefore, believe that Arrow's defense that Bazile was, with respect to the trip and activity here involved, an independent contractor and for whose conduct it is in no way liable is not tenable under the facts and circumstances of this case. Rather, it would seem to us, Whitaker was the servant and agent of both, and both are to be held responsible for his negligence under the common law doctrine of *respondeat superior*. In taking this view, we recognize the difficulty of factually measuring and attempting to precisely delineate the degree of control possessed or exercised by either Bazile or Arrow over Whitaker subsequent to the execution of the lease and during the truck's journey from Monett, Missouri, to Huntington, West Virginia. But Bazile did say, and it

stands uncontradicted in the record, that it was the custom of the trade for Arrow to have control of the truck until the cargo was delivered, and this is consistent with Section 304(7)(e), which places responsibility upon the lessee for the operation of a leased vehicle. Having found that Arrow cannot escape this responsibility through Section 303(b), it must be held jointly liable with Bazile for the verdict and judgment rendered. We believe that this result is in accord with, and is supported by, the following case law: *Jackson* v. *Blue*, 152 F.2d 67 (4th Cir. 1945); *War Emergency Co-op. Ass'n.* v. *Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *Carriers Ins.* v. *Truck Ins. Exchange*, 203 F.Supp. 764 (W.D. Va. 1962); affirmed on appeal, 310 F.2d 653 (4th Cir. 1962); *Porter* v. *St. Louis-San Francisco Railway Co.*, 354 F.2d 840 (5th Cir. 1966), citing with approval *Carriers*, supra; *American Transit Lines* v. *Smith*, 246 F. 2d 86 (6th Cir. 1957), citing with approval *Hodges* v. *Johnson*, 52 F.Supp. 488 (W.D. Va. 1943); Annotation 17 ALR 2d, Sec. 7, p. 1408. Analogous is *Sommerville* v. *Penn. Ry.*, 155 S.E.2d 865 (W. Va. 1967).

It is, therefore, ADJUDGED and ORDERED that the plaintiff Barbara Brammer do recover of and from the defendants Myron J. Bazile and Arrow Lines, Inc., a corporation, the sum of Thirty-eight Thousand ($38,000) Dollars, with interest thereon from the date of said verdict and her proper costs, as provided by law, and that the plaintiff David Brammer do recover of and from the defendants Myron J. Bazile and Arrow Lines, Inc., a corporation, the sum of Five Thousand ($5,000) Dollars, with interest thereon from the date of said verdict and his proper costs, as provided by law.

Objections and exceptions by counsel for each defendant to the aforesaid rulings and judgment of the Court are hereby noted.

The issue raised by the cross-claim of Arrow Lines, Inc., against Myron J. Bazile has not been briefed and a ruling thereon at this time is, therefore, deferred. Counsel for Arrow and Bazile should confer and advise the Court within ten (10) days with reference to their respective positions in regard to this cross-claim.

The Clerk is directed to send forthwith, by United States Mail, attested copies of this Memorandum Order to Norman E. Rood and Robert O. Ellis, counsel for the plaintiffs; Paul W. McCreight, counsel for defendant Myron J. Bazile, and C. Robert Schaub, counsel for defendant Arrow Lines, Inc., all of Huntington, West Virginia, which shall constitute due and sufficient notice to them of the entry thereof.

ENTER: April 1, 1969.

s/ SIDNEY L. CHRISTIE
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

AT HUNTINGTON

---

BARBARA BRAMMER and
DAVID BRAMMER,
Plaintiffs,

Vs. CIVIL ACTION NO. 2188

MYRON J. BAZILE and
ARROW LINES, INC.,
a corporation,
Defendants.

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### MEMORANDUM ORDER

By a memorandum order entered herein on April 1, 1969, the Court determined that the defendants, Myron J. Bazile and Arrow Lines, Inc., were joint tort-feasors and as such jointly liable to the plaintiffs for the verdict previously rendered by the jury in this case.

The Court at that time left open for future determination the issue of Bazile's indemnity liability to Arrow raised by the cross-claim filed by Arrow against Bazile. In seeking indemnity, Arrow relies upon a provision in the lease agreement between Bazile, as lessor, and it, as lessee, to the effect that

"Lessor shall hold Lessee harmless from any acts or torts committed by Lessor, its agents or employees . . . ."

The question thus raised is to be determined by the Court as provided for in the pre-trial order, the pertinent portions of which are set out in the Court's memorandum order of April 1, 1969, above referred to.

Proceeding to a disposition of the matter, we interpret the indemnity provision to mean that Bazile is to hold Arrow harmless only for his negligence — not Arrow's — and insofar as the cross-claim attempts to hold Bazile responsible for Arrow's negligence, the same is unenforceable and will be dismissed. Under the interpretation we thus place upon the indemnity provision, the cross-claim becomes meaningless, since the same relief is afforded Arrow by the West Virginia statute relating to contribution by joint tort-feasors, Code 55-7-13. It is, therefore

ORDERED that the cross-claim of Arrow Lines, Inc. against Myron J. Bazile be, and the same is, hereby dismissed insofar as it would hold Bazile liable for Arrow's share of their joint liability.

The Clerk is directed to send attested copies of this memorandum order to Mr. C. Robert Schaub, attorney for Arrow Lines, Inc.; Mr. Paul W. McCreight, attorney for Myron J. Bazile; and Messrs. Robert O. Ellis and Norman E. Rood, attorneys for the plaintiffs.

ENTER: April 11, 1969

s/ SIDNEY L. CHRISTIE
United States District Judge

Supreme Court, U.S.
FILED
JUL 16 1970
ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 13,706 306

ARROW LINES, INC., a Corporation
*Petitioner,*

VS.

BARBARA BRAMMER and
DAVID BRAMMER
*Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## Brief for Barbara Brammer and David Brammer
*In Opposition*

ROBERT O. ELLIS, JR.
*Counsel for Respondents*

ROBERT O. ELLIS, JR.
and NORMAN E. ROOD
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Huntington, West Viginia
*Of Counsel*

FRANKLIN PRINTING CO.

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IN THE

# Supreme Court of the United States

FOR THE FOURTH CIRCUIT

No. 13,706

ARROW LINES, INC., a Corporation

*Petitioner,*

VS.

BARBARA BRAMMER and
DAVID BRAMMER

*Respondents*

## Opposition Brief for Barbara Brammer and David Brammer, *Respondents*

In this brief, references will be made to the respondents as "Barbara Brammer" and "David Brammer"; references to petitioner will be to ""Arrow Lines"; references will be made to Myron J. Bazile, owner of the tractor trailer, as "Bazile", and to Dallas B. Whitaker, its driver, as "Whitaker".

## QUESTIONS PRESENTED

1. Was Barbara Brammer guilty of contributory negligence which as a matter of law precluded recovery by her and David Brammer, her husband?

2. Was Arrow Lines legally liable for the actions of Whitaker, driver of the tractor-trailer that collided with the Brammer automobile?

3. Was the refusal of Arrow Lines' Request for Charge No. 1, if made, reversible error?

## STATEMENT OF THE CASE

### (a) Statement of Facts

At approximately 12:00 o'clock midnight on the 22nd day of November, 1964, a tractor and trailer driven by Dallas B. Whitaker, now deceased, and owned by Myron J. Bazile, while proceeding east on U. S. Route 60, at the intersection of said Route with Wayne Street, in the City of Huntington, West Virginia, collided with an automobile being driven in a northeasterly direction through the intersection by Barbara Brammer, and which vehicle was owned by David Brammer, her husband.

The driver was alone in the tractor and trailer. Mrs. Linda Johnson, a friend of the Brammers, was riding in the front seat of the car beside Barbara Brammer.

The collision occurred in the intersection of U. S. Route No. 60 and Wayne Street, (at which all traffic is controlled by a traffic signal light) approximately opposite a drive-in restaurant known as "Long's Parkette". Present near the scene and witnesses to the collision were employees of the drive-in and a City Police Officer.

After the collision, driver Whitaker stated to investigating officers that he was a substitute driver hauling a cargo of frozen turkey into West Virginia for Arrow Lines; that the tractor and trailer were owned by Bazile; that he was not familiar with the road and that he did not see the traffic signal light at the intersection prior to the collision.

The tractor-trailer was traveling into Huntington, West Virginia, with a cargo of frozen turkey. Arrow Lines

was the holder of a permit to haul such a commodity within West Virginia from the Public Service Commission of the State of West Virginia.

Driver Whitaker, as had been his practice previously for Bazile, for and on behalf of Bazile, and in the latter's name, executed a written lease for the rig for a term from November 19, 1964, to November 19, 1965, with Arrow Lines to pay Bazile 85% of the gross revenue on all loads to be hauled; that cargo and destinations were to be designated by Arrow Lines; that Bazile was to haul ICC exempt commodities or ICC non-exempt commodities with ICC permits; that Arrow Lines had the right to approve the driver; that Arrow Lines would receive all revenues from hauling and disburse the same, and that Arrow Lines would carry public liability insurance on the operation.

Driver Whitaker was directed to and did haul cargo pursuant to the lease agreement. A percentage of the gross revenue received by it was subsequntly paid to Bazil by Arrow Lines and Arrow Lines carried the public liability insurance coverage for the operation called for by the lease. The collision itself was investigated by the insurer of Arrow Lines, and the claim of Linda Johnson paid by it. After this action was instituted, counsel for Arrow Lines appeared at and prevented plaintiffs from taking depositions herein, although Arrow Lines was not then a party to this action.

Immediately after the collision, David Brammer called William (Bill) Ferguson, an employee of Arrow Lines, and was advised by him that the cargo of frozen turkey was being hauled for Arrow Lines; that the damage would be taken care of and dispatcher Ferguson referred the Brammers to the insurer for Arrow Lines, whose Huntington representative sought to negotiate a settlement direct with the Brammers.

## (b) Statement of Trial Proceedings

This action was instituted by counsel for Barbara Brammer and David Brammer at a time when limited information was available from the police report of the collision and the facts as to the registration records of the tractor and the trailer and its operation were vague and uncertain.

Pursuant to the Civil Rules of Procedure, the Brammers, as plaintiffs, immediately tried to depose Joseph W. Mudd and Edward G. Smith, both of whom had participated in an investigation of the collision and whom counsel for the Brammers knew had obtained written statements concerning the collision from the driver of the tractor and trailer, but the taking of such deposition was prevented by Arrow Lines' counsel, C. Robert Schaub and his associate, although at the times the taking of such depositions were attempted, Mr. Schaub and his associate were neither counsel for any party to this action nor counsel for Joseph W. Mudd or Edward G. Smith.

As soon as counsel for the Brammers learned that the said Mr. Schaub was in fact representing Arrow Lines, and that the settlement of a claim for damages of Mrs. Linda Johnson, the passenger in the vehicle driven by Barbara Brammer, had been made by payment of a draft to her from the insurance company which was insurer of Arrow Lines, an Amended Complaint was filed making Arrow Lines a party defendant to this action.

By interrogatories, depositions and request for admissions by counsel, the Brammers overcame the initial obstructive tactics of counsel for Arrow Lines and the evidentiary limitations imposed on the Brammers as a result of the death of the driver, the negligent operation of the tractor and trailer was established and the crucial issues for the jury were as to contributory negligence of

Barbara Brammer and the amount of damages, if any, which each of the Brammers was entitled to recover. By stipulation, the issue as to the imputability of liability for the tort of the driver of the tractor and trailer resulting was thereafter to be and was determined adversely to Arrow Lines by the trial Court upon the pleadings and evidence.

## ARGUMENT

### 1. BARBARA BRAMMER WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE PROXIMATELY CONTRIBUTING TO THE COLLISION.

The contention of Arrow Lines is that Barbara Brammer was contributory negligent because she failed to look concerning an open and obvious danger. (Petitioner's Petition page 8).

In the context of the Petition, petitioner really means that Barbara Brammer failed to look often enough or continuously, but looked sufficiently to ascertain the existence of a known danger.

By positive evidence of the Brammers and their witnesses, it was established that Barbara Brammer:

(a) Stopped her automobile south of the intersection of U. S. Route 60 and Wayne Street in compliance with the red traffic control signal light controlling traffic heading north toward U. S. Route No. 60;

(b) Looked to the west on U. S. Route No. 60 and several times at the east bound traffic on U. S. Route No. 60;

(c) Observed on several occasions the tractor and trailer coming east on U. S. Route No. 60 toward the intersection;

(d) Waited for the traffic control signal light to change to green for traffic coming into the intersection from Wayne Street;

(e) Observed the traffic control signal light change to green for her vehicle;

(f) Assumed the driver of the tractor and trailer driving east toward the intersection would obey the red traffic control signal light and stop his vehicle west of the intersection;

(g) Entered the intersection after the traffic control signal light turned green for her vehicle and before the tractor and trailer entered into it;

(h) Was struck by the tractor and trailer thereafter entering into the intersection in violation of the red traffic control signal light.

One is not required to anticipate heedlessness in another, has the right to assume that another will act with care and if injured as a result of that assumption is not guilty of contributory negligence, and it was not negligent on the part of plaintiff Barbara Brammer to fail to look out for the possible omission by the driver of the tractor and trailer of his duty to stop his vehicle for the red traffic control signal light. *Ritter v. Hicks*, 102 W. Va. 541, 135 S. E. 601 (1926); 13 M. J. 543 "Negligence".

The failure to anticipate the omission of reasonable care on the part of another driver in the operation of his vehicle does not render a person contributory negligent. One is not required to know he is absolutely safe before taking any given course of action, but is required merely to exercise ordinary care to avoid a collision, that is to say, such care as a reasonable prudent person would

exercise under the circumstances. *Sewell v. Lawson*, 115 W. Va. 527, 177 S. E. 293 (1934).

In *Moore v. Skyline Cab, Inc.*, 59 S. E. 2d 437 (1950) cited in brief by petitioner, the collision occurred in the center of an intersection, where traffic was controlled by applicable law and not by a traffic control signal light. Plaintiff's decedent was held to be guilty of contributory negligence as a matter of law, but on clear evidence of excessive speed by plaintiff's decedent and his failure to stop before entering the intersection. The *Moore* case has been cited by our West Virginia Court on three (3) occasions, but essentially for the proposition that the violation of ordinances or statutes is itself prima facie negligence. *Costello v. City of Wheeling*, 117 S. E. 2d 513, 517 (1960); *Payne v. Kinder*, 127 S. E. 2d 720, 739 (1962); *Barnaik v. Grossman*, 93 S. E. 2d 49, 53, (1956).

The only evidence of violation of ordinances or statutes in this case is that the driver of the tractor and trailer did not see and ran the red traffic control light. In the *Costello* case, our Court stated the general rule that if the material facts are not in dispute and a reasonable man can draw but one conclusion from them contributory negligence is a question of law for the Court. However, at page 517, the Court noted that issues of primary negligence, contributory negligence and proximate cause are questions for jury determination unless there is no evidence upon which to found a verdict for a plaintiff, or the conflicting evidence clearly preponderates in favor of the defendant. In the *Payne* case, at page 739, the Court stated that when a case has been tried and questions of fact arising in it have been submitted to the jury and a verdict has been fairly rendered and the trial court has committed no error of law, the verdict will not be disturbed unless manifest wrong or injury has been done or it clearly appears that the verdict

is contrary to the weight of the evidence or that it is without any evidence to support it.

It is only by inference that it can be stated that the tractor and trailer was an open and obvious danger as it proceeded east on U. S. Route No. 60. Barbara Brammer would have had to assume that the driver of the tractor and trailer would not obey the red traffic control signal light, and under the undisputed facts and circumstances of the case, she was not required by law to make such assumption, either at a time when the tractor and trailer was 750 feet away, 400 feet away, or at anytime prior to the time it proceeded into the intersection in violation of the red traffic signal light.

A choice of inferences has been resolved by the verdict of the jury and the affirmation of the District Court and Court of Appeals.

This Court has said that:

> "whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

In *Sayre v. Shields*, Va., 1968, 164 S. E. 2d 665, cited by petitioner, this Court on appeal sustained the action of the trial court in setting aside a jury verdict for plaintiff because of plaintiff's contributory negligence under applicable Virginia law, but in that case the collision giving rise to the action against defendant by plaintiff occurred at an intersection not controlled by a traffic control signal light and plaintiff at no time prior to impact saw the defendant's vehicle. No analogy whatever can exist in the *Sayre* case originating in Virginia

and controlled by Virginia law, where the Court affirms the action of the trial court in directing a verdict on the issue of contributory negligence of plaintiff under entirely different facts and circumstances. The total failure to keep a lookout to an existing danger is in sharp contrast to the case now before the Court where Barbara Brammer kept a lookout and the danger arose only when the driver of the tractor and trailer failed to stop for the red traffic control signal light. This issue would probably have been resolved in favor of plaintiff as a matter of law had C. Robert Schaub and his associate not improperly intervened in this action and prevented the taking of depositions of Joseph W. Mudd and Edward G. Smith, at a time when he and his associate was not counsel of record for any party to the action and did not represent the parties sought to be deposed or their employer.

2. THE NEGLIGENT ACTION OF DRIVER WHITAKER IN CAUSING THE COLLISION, IS IMPUTABLE AS A MATTER OF LAW TO ARROW LINES.

(a) THE NON-DELEGABLE DUTY AND LIABILITY FOR TORT OF ARROW LINES EXISTS FOR CAUSING CARGO TO BE MOVED IN INTERSTATE COMMERCE;

(b) THE NON-DELEGABLE DUTY AND LIABILITY FOR TORT OF ARROW LINES EXISTS FOR CAUSING CARGO TO BE MOVED IN COMMERCE IN THE STATE OF WEST VIRGINIA;

(c) THE LIABILITY OF ARROW LINES FOR THE NEGLIGENCE OF DRIVER WHITAKER EXISTS BECAUSE HE COMMITTED AN ACT OF NEGLIGENCE WHILE ACTING AS ITS BORROWED SERVANT AND AGENT.

In *War Emergency Co-Op Association v. Widenhouse*, 169 F. 2d 403 (4th Cir., 1948), the Court held that no lease agreement between the party causing the goods to be moved in interstate commerce and its purported independnt contractor will free the party causing the goods to be so moved from liability for the negligence of the driver of the independent contractor under the lease. Noting that members of the public might be deprived of safeguards imposed upon the party causing the cargo to be moved in interstate commerce if such party were permitted to employ irresponsible persons as independent contractors, that Court refused to permit the lessee to escape liability despite the provisions of the lease stating the lessee to be immune from liability of the lessor or his agents.

In *Hodges v. Johnson*, 52 Fed. Supp. 488 (Va., 1943), the Court concluded that the owner of the truck, as the employer of the driver, having the supervision and control of the operation, was liable for the driver's negligence; that although the owner of the vehicle was an independent contractor, and there would normally be no liability upon the lessee from the owner for the negligence of the owner's driver, it is an exception to the general rule that the employer of the independent contractor is not liable, and any lease arrangement of a tractor and trailer moving in interstate commerce makes the lessor and the lessee jointly and severally liable for the negligence of the driver of the truck. In referring to the *Restatement of the Law of Torts*, page 1129, Section 428, the Court stated that the operation of a tractor and trailer is an activity involving an unreasonable risk of harm to others; that it is fraught with great danger to the traveling public; that all the states in the union have enacted comprehensive regulatory laws governing the operation of such transportation; that the Congress of the United States of America, by and through the Interstate Commerce Commission, has regu-

lated all such shipments; that a primary purpose of such regulation is to protect the public traveling upon the highways; that public policy requires that where any corporation is organized for the purpose of discharging certain functions for the benefit of the public, it cannot delegate these functions to another corporation or an individual and escape responsibilities for injuries caused by non-performance of such duties, which by law is attached to the exercise of such a privilege.

In *Louis v. Youngeren and Sims*, 133 N. E. 2d 696 (Ill., 1956), both lessor and lessee were held liable because the lessor loaned his employee to the lessee under such a lease agreement that each of them had such duties and rights incident to the lease agreement as would preclude either from escaping liability for negligence of the driver. The Court also noted that when a tort is committed by an agent or employee in the course of his employment and while pursuing his employer's business, the employer will be liable for any damages resulting from such tort, although it is done without the employer's knowledge or consent, unless the wrongful act is a wrongful departure from such employment or business.

The ordinary and customary practices and actions of the trade and of these parties in the trucking business apply in determining the course and scope of employment here, and evidence of the existence of public liability insurance is admissible and relevant in an accident. *Orgel v. McCurdy*, 8 F. R. D., 585 (S.D.N.Y., 1948).

Where, as here, a commercial motor truck bearing the name and carrying the information as to I.C.C. permit numbers and is carrying cargo upon the highway as it is authorized to do, and while so doing it collides with another vehicle, a presumption arises not only that such truck belonged to the one whose name and markings it

purports to bear, but also that it was being operated in its business at the time of the collision. *McDougall v. Glenn Cartage Co.*, 159 Ohio St. 522; 160 N. E. 2d 266 (1959).

Part II of the Interstate Commerce Commission Act (49 U.S.C.A. Section 301 et. seq.) provides extensive regulation for interstate transportation of goods and subjects to regulation anyone who undertakes to transport such goods, whether they be carrier, freight forwarder, broker, etc., and whether such persons so participate via lease or other arrangement.

Certain commodities are exempt from many regulations under the Interstate Commerce Act. Frozen poultry is so exempt. (40 U.S.C.A. 303). However, various regulatory provisions are still applicable to persons who are causing to be transported such cargo in interstate commerce. Among such regulations are regulations pertaining to lease arrangements for non-owned transportation equipment so used. Such a lease must be in writing and signed by the parties, specify the duration of the lease, designate the compensation to be paid by the lessee. A copy of such lease shall be carried in the vehicle covered under the lease. The lessee must have full direction and control of such vehicle. The lessee is fully responsible for the opration of such vehicle, as if the lessee is the owner of the vehicle itself. (49 U.S.C.A. 304(e), 49 C.F.R. 207.4).

Where the lessor and lessee of a tractor and trailer causing goods to be moved in interstate commerce used a written form lease, as contemplated by such statute and the rules and regulations of the Interstate Commerce Commission made pursuant thereto, the Courts have held that as a matter of public policy both are to be held liable for damages from its negligent operation. *Carriers Ins. Exchange v. Truck Ins. Exchange*, 310 F. 2d 653 (4th Cir., 1962).

The written lease between Arrow Lines and Bazile was obviously made pursuant to 49 U.S.C.A. 304 (e) and I.C.C. Regulations 207, et. seq.

In *American Trucking Association, Inc. v. United States*, 344 U. S. 298, 73 S. Ct. 307 (1952), the Supreme Court upheld the power of the Interstate Commerce Commission to regulate lease arrangements for augmenting needed equipment, even as to exempt commodities:

> "The exemption extends, by its own words, to carriage of agricultural products, and not to operations where the equipment is used to carry other property." (P. 318).

(b) The non-delegable liability of Arrow Lines exists because it was causing cargo to be moved in commerce in the State of West Virginia.

Without regard to ownership of the tractor-trailer, its operation upon the public highways of the State of West Virginia obligated every person, including Arrow Lines, who undertook, whether directly or by lease or any other arrangement, to transport cargo, as to a primary duty to any member of the public injured by the negligent operation of that motor vehicle and without regard to any collateral or indemnifying agreement.

WEST VIRGINIA MOTOR CARRIER LAW

Code of West Virginia, Chapter 24-A

EFFECTIVE JULY 1, 1961

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Charleston

ARTICLE 1 — Purposes, Definitions, and Exemptions.

Section 1. Purposes. It is hereby declared to be the purpose and policy of the Legislature in

enacting this law to confer upon the public service commission of West Virginia, in addition to all other powers conferred and duties imposed upon it by law, the power, authority and duty to supervise and regulate the transportation of persons and property for hire by motor vehicles upon or over the public highways of this state so as to: (a) protect the safety and welfare of the traveling and shipping public in their use of transportation agencies by motor vehicles; . . . . This act shall apply to persons and motor vehicles engaged in interstate commerce to the extent permitted by the constitution and laws of the United States.

Section 2. Definitions. When used in this chapter: (a) the term "motor vehicle" means, and includes, any . . . tractor, truck tractor, trailer, semi-trailer . . . (e) the term "common carrier by motor vehicle" means any person who undertakes, whether directly or by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public over the highways of this state by motor vehicles for hire, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail, water or air and of express or forwarding agencies, and leased or rented motor vehicles, with or without drivers; (f) the term "contract carrier by motor vehicle" means any person not included in subsection (e) of this section, who under special and individual contracts or agreements, and whether directly or by lease or any other arrangement, transports passengers or property over the highways in this state by motor vehicles for hire; (g) the term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle; (h) the term "exempt carrier" means any person operating a motor vehicle exempt from the provisions of this chapter under section three hereof; . . . .

Section 3. Exemptions. The provisions of this chapter, except where specifically otherwise provided, shall not apply to: . . .

(3) Motor vehicles used exclusively in the transportation of agricultural or horticultural products, livestock, poultry, and dairy . . . .

ARTICLE 2—Common Carriers by Motor Vehicles.

Section 1. Subject to Public Utility and Common Carrier Laws. All common carriers by motor vehicle are hereby declared to be affected with a public interest and subject to the laws of this state now in force or that hereafter may be enacted pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

and *Henry R. Somerville v. Pennsylvania Railroad Co.*, 155 S. E. 2d 865 (1967) precludes such carrier from delegating its duty and liability to third parties while acting as a carrier in West Virginia.

(c) The liability of Arrow Lines for the negligence of Driver Whitaker exists because he was its borrowed servant.

The liability of Arrow Lines can be predicated upon the "borrowed servant" doctrine, where a servant in the service of one may be transferred for a specific service under the control of another, so as to become the latter's servant for that specific work, and carry the liability for the tort of such servant.

The legal relationships between and among the deceased driver Whitaker, Arrow Lines and Bazile was not an employment for hire relationship between only two (2) legal entitles. The relationship between Bazile and

driver Whitaker was in some aspects that of master-servant and in some aspects agen-principal: the relationship between Arrow Lines and driver Whitaker was the same.

In its inception the relationship between Bazile and the driver was that of master-servant with the concomitant responsibilities and duties incident thereto, but driver Whitaker, in making lease arrangements with others, acted as agent for Bazile, either expressly or by implication of law, and with express or implied authority reasonable and necessary to carry out the purposes of such agency relationship.

Thus, prior to November 22, 1964, the driver, while so driving for Bazile, was his servant and agent. Once the lease was operative, it gave rise to a second and dominant master-servant relationship between the driver and Arrow Lines. This is the true "loaned" or "borrowed" servant rule. This relationship fixes liability for tort upon the master who directs and controls the servant at any specific point in time.

The evidence conclusively shows:

(1) That Bazile did not know where driver Whitaker or the rig was for three, four or five days prior to the collision of November 22, 1964;

(2) That he did not know the nature of the cargo, the point of origin or the cargo or its destination;

(3) That as lessee Arrow Lines accepted the driver and instructed him in applicable laws incident to its operation as a carrier in both interstate and West Virginia commerce;

(4) That it paid him money for expenses, gas, oil, etc.;

(5) That it dispatched him through its employee, William Ferguson, with a copy of the lease agreement aboard;

(6) That it promised to and did insure the trip for public liability purposes;

(7) That it gave him the hauling permits and stickers to put on the rig;

(8) That in the custom of the trade it had control and supervision of the driver until the trip was over;

(9) That it received the report of the collision from the driver, and

(10) That at the conclusion of the trip it received from the driver the delivery receipt and the signs which were used on the truck.

Every essential of control of that driver and that operation vested in Arrow Lines at the time of the collision.

4. FAILURE OF THE COURT TO GIVE ARROW LINES' REQUEST FOR CHARGE NO. 1, IF MADE, WAS NOT OBJECTED TO, OR IF OBJECTED TO WAS CURED BY ARGUMENT OF COUNSEL AND WAS HARMLESS ERROR.

Counsel for Arrow Lines is more emphathetic now concerning his request for charge and objection to refusal thereof than he was at the time the matter came before the Court. At that time the record shows counsel stated that he had no objection to the Court's proposed charge.

Rule 51 provides that "no party may assign as error the giving or failure to give instruction, unless he objects thereto before the jury retires to consider its verdict,

stating distinctly the matter to which he objects and the grounds of his objection". The above recited record shows that no objection was in fact made to the action of the Court on this request for charge of counsel for appellant and that after counsel stated that they had no objection, the Court took the matter up again on is own.

However, even assuming the requisite objection was made, counsel for Arrow Lines waived same when he asked for and received permission of the Court to make and did make a statement to the jury in his closing argument on the matter of the missing Dr. Oscar Weaver.

It is apparent that Dr. Weaver was equally accessible to all parties to the action and not peculiarly available only to the Brammers. Under these circumstances the action of the trial Court in not making any such charge concerning this physician is not an abuse of its judicial discretion. *Morrison v. U. S.*, 365 Fd. 2d 521 (App. D. C. 1966).

In the absence of specific objection of counsel for Arrow Lines to the Court's refusal to charge, and because its counsel did argue the possible inferences to the jury, any refusal to so charge simply does not constitute error, or at most harmless error under Rule 61:

"HARMLESS ERROR

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court

at every state of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

## CONCLUSION

At the trial of this action, petitioner did not sustain its burden of proving contributory negligence of Barbara Brammer proximately contributing to the collision. Liability for the tort of driver Whitaker is imputable to Arrow Lines on the bases that it caused cargo to be moved *in interstate or intrastate commerce,* and in either event owed a non-delegable duty of care to the Brammers, which was breached, and it was likewise liable for the tort of driver Whitaker by principles of master-servant and principal-agent law which were extant between Arrow Lines and the driver at the time of the collision. The failure of the trial Court to grant a request for a charge, if made, as to a possible jury inference where no specific objection was made is not reversible error, and such verdicts should stand.

Respectfully submitted,

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